**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges | ) | WC Docket No. 05-276 |
| Petition for Declaratory Ruling that VarTec Telecom, Inc. Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination | ) | |

# REPLY COMMENTS OF AT&T INC.


James P. Lamoureux
Jack Zinman
Gary L. Phillips
Paul K. Mancini
AT&T INC.
1401 I Street, N.W.
Washington, D.C. 20005
(202) 326-8800

Michael K. Kellogg
Colin S. Stretch
Evan T. Leo
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Martin E. Grambow
Randall Johnson
AT&T INC.
175 E. Houston
San Antonio, Texas 78205
(214) 464-3620

*Counsel for AT&T Inc.*


December 12, 2005

**TABLE OF CONTENTS**

Page

## INTRODUCTION AND SUMMARY

The core facts at issue here are largely uncontested. No one disputes that, in April 2004, the Commission ruled that so-called "IP-in-the-middle" long distance calls – *i.e.*, ordinary long-distance calls that are transported using the Internet Protocol ("IP") – are "telecommunications services" subject to access charges.[1] Nor does any party dispute that, as the Commission expressly stated, its holding applies regardless of whether a given call is transported by a single provider or by multiple providers. Nor, finally, does any party contest the fact that, despite the Commission's unequivocal holding, numerous providers – including, most obviously, PointOne – continue to route interexchange PSTN-to-PSTN calls using IP *without* payment of access charges, or that, in doing so, these providers avoid paying at least $1 million in access charges every month *to the AT&T ILECs alone*.[2]

The key question at issue here, then, is not whether the Commission's ruling is being ignored – it plainly is – but rather who should be held liable for it. As AT&T explained in its Petition for Declaratory Ruling, IP-based providers such as PointOne provide the same basic service that was at issue in the *AT&T Order*, and they are accordingly liable for access charges on IP-in-the-middle calls. As AT&T further explained in its comments on VarTec's Petition, the long-distance carriers that deliver traffic to PointOne and similar providers may likewise be liable, provided they know or should know that access charges are being avoided on the calls in question. Although each of these classes of carriers insists that only the other should be left

---

[1] *See* Order, *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004) ("*AT&T Order*").

[2] On November 18, 2005, SBC Communications Inc. and AT&T Corp. closed their merger. The resulting company is now known as AT&T Inc. References to "AT&T" herein refer to the merged company, including its ILEC operating subsidiaries, unless otherwise noted. Where these comments refer to AT&T prior to the merger with SBC, the term "AT&T Corp." is used.

holding the bag, neither provides any basis to dispute the lawfulness or logic of AT&T's straightforward, equitable proposal for ensuring compliance with the *AT&T Order*.

**I.** PointOne makes no effort to dispute the basic facts set out in AT&T's Petition, including, most notably, the fact that, more than a year and a half after the *AT&T Order*, PointOne continues to route an enormous volume of interexchange PSTN-to-PSTN voice telephone traffic without payment of access charges. Instead, as its lead argument, PointOne contends that it cannot as a matter of law be liable for those access charges for the simple reason that it calls itself an "enhanced services provider" rather than an "interexchange carrier" ("IXC") and is thus covered by the "ESP Exemption." But an elemental principle of telecommunications regulation is that Commission regulation is determined by the *nature of the service*, not the name, history, or self-designation of the entity that provides it. PointOne's assertion that it is an "enhanced service provider" is therefore beside the point. If the *service* that PointOne provides is the long-haul transmission of ordinary voice telephone calls that begin and end on the PSTN, PointOne is liable for access charges, irrespective of what other services it may also provide.

PointOne also insists that, in any event, the service it provides – *i.e.*, the use of IP to transmit long-distance calls that originate and terminate on the PSTN – is an "enhanced service" that is exempt from access charges. This claim is astonishing. It is, practically word-for-word, the exact same claim that AT&T Corp., PointOne, Transcom Enhanced Services, LLC ("Transcom"), and others made – and the Commission decisively rejected – in the *AT&T Order*. Indeed, if PointOne's use of IP to facilitate transmission of long-distance PSTN-to-PSTN calls transforms those calls into enhanced services, then so too does any other carrier's use of IP, including AT&T Corp.'s. As we have seen, the Commission already rejected that result, and

PointOne's insistence on pursuing it here only confirms its ongoing defiance of the Commission's clear ruling.

PointOne also claims that, irrespective of the nature of the service it provides, it is immune from access charge liability because it supposedly is not a "common carrier." But PointOne has no answer to the Commission's holding in *HAP Services*, which makes clear that access charge liability extends to both common carriers and private carriers, provided that the carrier in question transmits "interstate traffic for hire" between exchanges, as PointOne indisputably does.[3] Indeed, because this precedent is so clear, PointOne is reduced to arguing that it is wrong. But PointOne does not, because it cannot, identify a single instance in which the Commission even questioned this precedent, much less where it reached a contrary decision.

In all events, even if PointOne were correct that access charges apply only to common carriers, it still could not prevail, because the evidence in the record thoroughly refutes PointOne's claim of private-carrier status. In its Petition, AT&T highlighted evidence that makes clear that PointOne offers basic transmission service to any and all comers, and that it assesses rates (including rate increases) on an across-the-board basis. Astonishingly, PointOne *does not even acknowledge, much less rebut*, this clear evidence of common-carrier status. Its failure to do so is enough, standing alone, to reject its claim. Furthermore, the evidence PointOne does produce – a summary, generalized declaration that provides no details whatsoever regarding the nature of PointOne's supposedly "individualized" deals – is insufficient to demonstrate that it is a private carrier. If PointOne truly were a private carrier, it could and would have produced at least a modicum of detail to confirm it. The fact that it has not even attempted to do so should be dispositive here.

[3] Memorandum Opinion and Order, *HAP Services, Inc. v. Southwestern Bell Telephone Company*, 2 FCC Rcd 2948, ¶ 15 (1987).

**II.** PointOne is not alone in its liability for access charges on the IP-in-the-middle traffic that carriers continue to carry in stark defiance of the *AT&T Order*. Rather, as noted above – and as explained in more detail in AT&T's comments on VarTec's Petition – the long-distance carriers that deliver calls to the PointOnes of the world may likewise be liable for access charges, provided they know or should know that the traffic will be terminated without payment of access charges.

Several long-distance carriers dispute that result. From these carriers' perspective, once they hand off a call to another carrier, that is the end of the matter, and they no longer bear any responsibility for any access charges that may be evaded on the termination of that call. After all, these carriers explain, LEC tariffs – including the AT&T ILEC tariffs – typically require that, to be liable for access charges, a carrier must "subscribe" to the service by interconnecting directly and ordering service consistent with the precise terms in the tariff. Where a call is terminated *indirectly* through intermediary carriers, the theory goes, a carrier cannot be liable for access charges.

As AT&T has already explained, the constructive ordering doctrine decimates that claim. Under that doctrine, a carrier is subject to access charges, irrespective of whether it has ordered service in the manner dictated by the tariff, if the carrier (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in fact receive such services. Each of these requirements is met here, thus confirming that long-distance carriers that deliver traffic to PointOne and similar providers are liable for the tariffed charges that are avoided as a result. Indeed, in the *AT&T Order* itself, AT&T Corp. did not deliver calls directly to ILECs, nor did it "subscribe" to the tariffed service it obtained. Instead, AT&T Corp. routed calls through intermediary carriers

in order to *avoid* subscribing to ILEC tariffs. Yet the Commission held that, even so, AT&T Corp. was liable for access charges. The same result applies here.

Commenters are wrong to contend that this outcome would result in double recovery. As AT&T has already explained, the principle here is one of joint and several liability. As the *AT&T Order* makes clear, when multiple service providers collaborate to transmit a call using IP and without payment of access charges, they are causing a single, indivisible harm. It follows that those carriers are jointly and severally liable for the damages that result.

Finally, there is no merit to the claim that the issues in this docket should be resolved only prospectively. The issues here flow directly from the *AT&T Order*, which the Commission issued for the express purpose of providing certainty over the highly contentious issue of whether access charges apply to IP-in-the-middle calls. The suggestion that, in the wake of that order, carriers continued to "rely" on their understanding to the contrary – and thus that they should be absolved of any liability for their defiance of the Commission's ruling – cannot be taken seriously.

## DISCUSSION

### I. IP-BASED TRANSMISSION PROVIDERS ARE LIABLE FOR ACCESS CHARGES ON IP-IN-THE-MIDDLE CALLS

The *AT&T Order* makes clear that access charges apply to interexchange, PSTN-to-PSTN calls routed using IP, even where those calls are routed through intermediary CLECs for termination to ILECs, and even where multiple providers collaborate to route the call. *See AT&T Order* ¶¶ 11 n.49, 14, 19. AT&T's Petition in this docket explained that, under a straightforward reading of Rule 69.5(b), IP-based wholesale transmission providers such as PointOne that participate in such call routing are liable for access charges for their role in this unlawful scheme. *See* 47 C.F.R. § 69.5(b); *id.* § 69.2(s); AT&T Petition at 18-21. AT&T further noted that this

result conforms to industry practice, under which wholesale providers are routinely assessed access charges on long-distance calls they terminate to local exchange carriers, and is mandated by the filed-rate doctrine, which forecloses carriers such as PointOne from "pay[ing] different rates for the same services" that other carriers obtain (and pay for) pursuant to tariff. *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998); *see* AT&T Petition at 21-24.

Of the dozens of parties commenting in this proceeding, PointOne is the only party that disputes any of this. It claims first that, as a rule, it cannot be liable for access charges no matter what sort of service it provides, because it holds itself out as an "enhanced services provider" and is therefore entitled in all cases to the "ESP Exemption." PointOne also claims that, in any event, the service at issue here is in fact an "enhanced service," apparently because PointOne's use of IP enables customers to do something other than (or in addition to) making telephone calls. Finally, PointOne claims that, to be liable for access charges, it must operate as a "common carrier," which PointOne insists it is not.

AT&T anticipated and refuted the bulk of these arguments in its Petition, *see* AT&T Petition at 24-33, and PointOne's failure to offer anything new says much about the merits of its position. In all events, as explained below, PointOne's arguments are legally and factually flawed.

### A. The ESP Exemption Does Not Save IP-Based Providers From Access Charge Liability When they Provide Transmission of PSTN-to-PSTN Calls

**1.** PointOne's lead argument is that it can *never* be held liable for access charges, even when it is providing transmission on ordinary PSTN-to-PSTN long-distance telephone calls, because it holds itself out as an "enhanced services provider," not an "interexchange carrier." *See* PointOne at 3-7. As PointOne sees it, the Commission's "ESP Exemption" excuses enhanced service providers from paying access charges *as a class*, regardless of the service they

happen to be providing in a given case. PointOne's argument thus appears to be that, because PointOne supposedly provides enhanced services in some cases, it is excused from paying access charges in all cases, even where it transmits ordinary long-distance telephone calls. *See id.*

PointOne's argument runs headlong into the bedrock principle that it is the nature of the *service* – not the name, history, or character of the entity providing it – that dictates its regulatory classification. Thus, for example, common carriers typically regulated under Title II – just like cable providers typically regulated under Title VI – become "enhanced service providers" regulated under Title I, when the service they provide is properly characterized as such. *See, e.g.*, Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 12 (2005); Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶¶ 34-41 (2002). Likewise – and more to the point for purposes of this proceeding – an enhanced service provider is regulated under Title I insofar as it provides an *enhanced* service, but not when it provides a "basic" or "telecommunications" service subject to Title II. As the Commission has explained, "entities that offer both interexchange services and enhanced services are treated as carriers with respect to the former offerings, but not with respect to the latter." Memorandum Opinion and Order, *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, 2 FCC Rcd 5986, ¶ 18 (1987), *vacated on other grounds*, 7 FCC Rcd 5644 (1992); *see* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 995 (1996) (subsequent history omitted).

When in the past the Commission has lost sight of this core principle – that the nature of the service defines its regulatory treatment – the courts have intervened. Reasoning that

anything offered by a service provider primarily in the business of common carriage *is* "common carriage," the Commission at one time attempted to regulate a dark fiber service as common carriage, even though the service had been offered only on a private-contract basis. The D.C. Circuit overturned that decision, noting that "[w]hether an entity in a given case is to be considered a common carrier" turns not on its usual status but "on the *particular practice* under surveillance." *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (emphasis added).[4]

Indeed, in the *AT&T Order* itself, the Commission held that access charges were due, not because, historically, AT&T Corp. was regulated as a long-distance carrier, but because *the service at issue* was a "telecommunications service" subject to access charges. As the Commission explained, end users making calls carried over AT&T Corp.'s IP-in-the-middle service "d[id] not order a different service, pay different rates, or place and receive calls any differently than they d[id] through AT&T's traditional circuit-switched long distance service," and those end users "obtain[ed] only voice transmission with no net protocol conversion." *AT&T Order* ¶ 12. The Commission thus "clarif[ied]" that IP-in-the-middle calls are "telecommunications services," and it was on that basis – not AT&T Corp.'s historic status – that the Commission determined that access charges applied. *See id.* ¶¶ 12, 14.

In the face of this well-established principle, PointOne appears to argue that, as long as it provides *some* enhanced services, it is entitled to the status of "enhanced service provider" – and the attendant ESP Exemption from access charges – for *all* of its communications activities, even

[4] *See also National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) ("*NARUC I*") ("[a] particular system is a common carrier by virtue of its functions"); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("*NARUC II*") ("Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.").

those, like transmission of PSTN-to-PSTN telephone calls, that are *not* enhanced services. *See* PointOne at 4 ("[T]he Commission understood and intended Rule 69.5 to exempt ESPs from access charges as a *class*. . . .") (emphasis in original). To support this far-reaching claim, PointOne relies on the fact that the Commission has retained the ESP Exemption in the face of repeated calls for its elimination. *See id.* at 7-9. That is *non sequitur*. To say that the Commission has retained a rule in the face of opposition says nothing at all about the *scope* of the rule. And, as explained above, the Commission has made clear that the ESP Exemption applies only where the provider is in fact providing an enhanced service.

Nor is the Commission's *Access Charge Reform Order* evidence to the contrary. *See id.* (citing First Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982 (1997)). Contrary to PointOne's apparent understanding, the *Access Charge Reform Order* does not extend the ESP Exemption to circumstances in which the provider is not in fact providing an enhanced service, and nothing PointOne cites suggests otherwise.

**2.** The core question here is thus not what PointOne calls itself, but rather the nature of the service it provides. In this respect, PointOne contends that, when it transmits interexchange calls that originate and terminate on the PSTN, its use of IP transforms those calls into "enhanced services" exempt from access charges. *See* PointOne at 9-12; Shiffman Decl. ¶¶ 1-9 (PointOne Exh. A). This claim – which is the *exact* same claim that AT&T Corp. made, PointOne and others supported, and the Commission rejected, in the *AT&T Order* – is absurd.

**a.** The Commission's decision in the *AT&T Order* confirms that PointOne's use of IP to transmit interexchange PSTN-to-PSTN calls does not transform those calls into "enhanced services." The precise issue presented in that order was whether AT&T Corp.'s use of IP to

transmit an interexchange, PSTN-to-PSTN call turned such a call into anything other than a telecommunications service. And the Commission firmly held that that the use of IP to transmit ordinary long-distance calls does *not* turn those calls into "enhanced" services that may be exempt from access charges. *AT&T Order* ¶ 1.

That holding disposes of PointOne's claim. In the *AT&T Order*, the Commission described with specificity the "type of service" to which its decision applied; namely, interexchange services that "(1) use[] ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originate[] and terminate[] on the . . . [PSTN]; and (3) undergo[] no net protocol conversion." *Id.* There can be no serious doubt that the interexchange PSTN-to-PSTN calls that PointOne carries meet this description. Like the AT&T Corp. service at issue in the *AT&T Order*, "PointOne converts from TDM to IP (if necessary, assuming that a communication session does not enter the PointOne network in an IP format), processes the IP packets across its network so that the enhanced features and functions can be accessed and used, and then routes the communication toward the desired endpoint, converting from IP to TDM (when necessary)." Shiffman Decl. ¶ 3; *compare AT&T Order* ¶ 3. If – as the Commission held in the *AT&T Order* – AT&T Corp.'s use of IP to transmit long-distance calls did not transform those calls into enhanced services, then neither does PointOne's use of the same technology.

That is particularly so in view of the fact that, for the calls at issue here – again, ordinary PSTN-to-PSTN calls – end users will likely be unaware that the so-called "enhancement" (the use of IP) has even taken place. In the *AT&T Order*, the Commission emphasized that the classification of the service must be examined from the perspective of the *end user*. Because "[e]nd-user customers d[id] not order a different service, pay different rates, or place and receive calls any differently than they d[id] through . . . traditional circuit-switched long distance

service," the service could not plausibly be considered the "offering" of an enhanced or information service capability to those end users. *AT&T Order* ¶ 12. That same analysis applies here and confirms that the mere use of IP to transmit a call – whether by PointOne or anyone else – does not exempt the call from the access charges that apply to all interexchange PSTN-to-PSTN calls. *See id.* ¶ 19 (noting that the Commission's conclusion applies where "a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN"); *see also* AT&T Petition at 13-14 (noting that the Commission's discussion in paragraph 19 cited a request that specifically asked the Commission to rule on the classification of calls carried by PointOne and other carriers that hold themselves out as enhanced services providers).

**b.** The Commission's ruling in the *AT&T Order* is confirmed by the plain text of the 1996 Act, which makes clear that the service PointOne provides in the transmission of PSTN-to-PSTN calls is not an "information service." PointOne's transmission does not involve the "*offering* of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," as required in order to qualify as an information service. 47 U.S.C. § 153(20) (emphasis added). Rather, what is offered to the end user is the ability to make a long-distance telephone call. The service therefore cannot qualify as an "information service" under the 1996 Act, which is a designation the Commission has said approximately parallels the pre-1996 Act definition of "enhanced service."[5]

[5] *See, e.g.*, *Access Charge Reform Order* ¶¶ 341 n.498, 430; First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, ¶ 103 (1997) (subsequent history omitted).

That is so, moreover, even if, as PointOne alleges (at 12), its use of IP "transforms" or "processes" the content of the call *before* "transforming" or "processing" it back into its originating format. The core point here is that, when PointOne inserts itself into the middle of a conventional long-distance call, the end user is still making a conventional long-distance call. The Commission has properly held that, in that circumstance, the end user is not receiving an "enhanced service," and the ESP Exemption accordingly does not apply. *See AT&T Order* ¶ 15 ("Customers of [AT&T Corp.'s] specific service receive no enhanced functionality by using the service.").

This analysis is also confirmed by the Supreme Court's recent decision in *National Cable and Telecommunications Association v. Brand X Internet Services*, in which the Court upheld the Commission's decision to categorize services as "information services" or "telecommunications service" based on "the nature of the functions the end user is offered." 125 S. Ct. 2688, 2703 (2005) (internal quotation marks omitted). The Court's analysis confirms that it does not matter whether PointOne's service "involves . . . changes to customer-supplied information . . . with every session" in the sense of converting voice communications into IP format and back again. PointOne at 11. Rather, what matters is the nature of the service offered to the end user. *See Brand X*, 125 S Ct. at 2703. In terms of what is offered to the end user, a PSTN-to-PSTN call that includes IP-in-the-middle is nothing more than a voice telephone call, plain and simple. As the Commission recognized in the *AT&T Order*, that telephone call must be regulated like any other conventional telephone call – including the applicability of access charges.

**c.** PointOne contends that, notwithstanding the Commission's clear ruling in the *AT&T Order*, its service qualifies as "enhanced." That is so, first, because PointOne's use of IP supposedly "transforms[] and processes" the content of each call, transforming each call into an

enhanced service. PointOne at 12; Shiffman Decl. ¶ 5. In addition, PointOne claims that it makes available – on each and every communication it carries – additional capabilities that are not available on calls carried over a conventional wireline network, and that turn ordinary calls into enhanced services exempt from access charges. *See* PointOne at 11; Shiffman Decl. ¶¶ 5-6. Neither claim is sufficient to distinguish PointOne's service from the use of IP that the Commission addressed in the *AT&T Order*.

PointOne argues first that its use of IP "transforms" and "processes" each call that it carries in a manner sufficient to remove that call from regulation as a telecommunications service. PointOne at 11 (citing Shiffman Decl. ¶¶ 3, 5). Indeed, PointOne's view is that *each* of the "signaling protocols" it uses to transmit a call in IP *necessarily* "change[s] the content" of the call in a manner sufficient to transform that call into an enhanced service. Shiffman Decl. ¶ 5. That includes, for example, so-called "packet loss concealment" – *i.e.*, a "method for dealing with packet loss in IP networks, whereby missing data is created by evaluating previous speech samples." *Id.* ¶ 5(c). But, as PointOne's own declarant suggests, packet loss concealment is a necessary component of *all* "IP networks" that are used to transmit voice. AT&T Corp. made precisely this point in the IP-in-the-middle proceeding, explaining that "voice reconstruction to compensate for lost packets and transmission errors," like the other steps that IP-based providers in that case highlighted as unique to the use of IP to transmit voice, is a "capabilit[y] of *all* phone-to-phone VOIP services (and, indeed, of virtually all packet-based services), including AT&T's VOIP service."[6] And, of course, in the *AT&T Order*, the Commission concluded that AT&T Corp.'s use of IP – including the "packet loss concealment" and other steps necessary to

[6] Ex Parte Letter from David Lawson on Behalf of AT&T Corp. to Marlene Dortch, FCC, CC Docket No. 02-361, at 3-4 (Apr. 13, 2004) (emphasis added; internal quotation marks omitted); *see also id.* at 2-3 (refuting PointOne's claims that its use of IP to transmit PSTN-to-PSTN calls was in any way unique).

such use – did *not* transform PSTN-to-PSTN calls into enhanced services. The same result applies here.[7]

Indeed, in the proceeding that led to the *AT&T Order*, PointOne itself *joined with AT&T Corp.* in a joint submission with other self-proclaimed "leaders in the emerging Voice over Internet Protocol ('VoIP') industry" intended to spur the Commission to grant AT&T Corp.'s petition and rule that the use of IP to carry PSTN-to-PSTN calls transformed those calls into enhanced services exempt from access charges.[8] As we have seen, the Commission did exactly the opposite. PointOne's effort to distance itself from that ruling is as disingenuous as it is unsupported.[9]

PointOne's reliance on the purported "additional capabilities" it offers end users is equally unavailing. *See* PointOne at 11; Shiffman Decl. ¶ 6. PointOne alleges that its service transforms ordinary voice telephone calls into enhanced services, supposedly because, during the

[7] PointOne also appears to be of the view that any service that works a "protocol" conversion on a communication qualifies as enhanced. *See* Shiffman Decl. ¶ 5 (stating that communications enter and leave PointOne's network in "different signaling protocols"). But the FCC has made clear that, to be an enhanced service under Commission precedent, a service must offer a *net* protocol conversion, and that converting a call into IP format and back again is not enough. *See AT&T Order* ¶ 4. And, to the extent PointOne is claiming that, on some PSTN-to-PSTN calls, it performs only one of the two conversions (*e.g.*, the IP to TDM conversion on PSTN-originated traffic that PointOne receives in IP format), the *AT&T Order* rejected the suggestion that carriers can so easily avoid access charges simply by providing IP-in-the-middle service in teams. *See id.* ¶ 19.

[8] *See* Ex Parte Letter from AT&T Corp., PointOne, *et al.*, to Hon. Michael K. Powell, FCC, WC Docket No. 02-361, at 1, 2-3 (Jan. 28, 2004).

[9] PointOne's claim that, in transmitting PSTN-to-PSTN calls, it acts like a conventional Internet service provider, *see* Shiffman Decl. ¶ 9, is also recycled from the proceeding that led to the *AT&T Order*. *See* Ex Parte Letter from Dana Frix and Kemal Hawa on behalf of PointOne to Marlene Dortch, FCC, WC Docket No. 02-361, at 5 (Feb. 24, 2004). The same is true for PointOne's repeated emphasis that it supplies "any-to-any" transmission. *See* Ex Parte Letter from Mike Holloway, PointOne, to Marlene Dortch, FCC, WC Docket No. 02-361, at 2 (Apr. 8, 2004).

course of any given call, an end user can access some additional information – say, real-time stock quotes – without interrupting the ongoing call. *See* Shiffman Decl. ¶ 6.

Any additional functionality that PointOne may provide, however, could be relevant only insofar as it is actually "offered" to end users, and end users are actually aware of it. Notably, PointOne has proffered no evidence indicating that it has "offered" these services to end users, that end users even know of the so-called "enhancements" on which it relies, or that the availability of these "enhancements" is in any way a feature that draws end users to PointOne's service. In the absence of such evidence, such "enhancements" are insufficient to alter the nature of the telecommunications service provided to end users.

**d.** In a last attempt to avoid the *AT&T Order*, PointOne relies on *In re Transcom Enhanced Services, LLC*, No. 05-31929-HDH-11, 2005 Bankr. LEXIS 1244 (Bankr. N.D. Tex. Apr. 28, 2005). There, the bankruptcy court ruled that the debtor in that case, Transcom, which provides services that are in all material respects identical to those provided by PointOne, is an "enhanced service provider" and thus is entitled to deliver traffic without the payment of access charges, pursuant to the terms of a contract between Transcom and AT&T Corp. Critically, however, the bankruptcy court made that determination in connection with Transcom's motion to assume its executory contract with AT&T. It is well established that a determination in connection with such a motion to assume in the bankruptcy context is *not* a "formal ruling on the underlying disputed issues." *E.g.*, *In re Orion Pictures Corp.*, 4 F.3d 1095, 1099 (2d Cir. 1993). Accordingly, such a determination "lacks any preclusive effect," and "another court – or even the same bankruptcy court – may reach a different conclusion after it tries the underlying dispute." *In re 611 Sixth Ave. Corp.*, 191 B.R. 295, 300 (Bankr. S.D.N.Y. 1996); *see Orion*, 4 F.3d at

1099; *In re Bankvest Capital Corp.*, 290 B.R. 443, 447-48 (B.A.P. 1st Cir. 2003), *aff'd*, 360 F.3d 291 (2004), *cert. denied*, 542 U.S. 919 (2004).

Apart from its lack of preclusive effect, the decision of the bankruptcy court in the *Transcom* case lacks even persuasive effect. The decision's most glaring defect is its misstatement of the Commission's ruling in the *AT&T Order*. The bankruptcy court held that the Commission's ruling in that order was "limited to AT&T and its specific services," 2005 Bankr. LEXIS 1244, at *13, when in fact the Commission emphasized that its ruling applied to the "*type* of service described by AT&T." *AT&T Order* ¶ 1 (emphasis added). Indeed, as we have noted, the Commission described exactly the type of service at issue; namely, a service that "(1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users. . . ." *Id.* The Commission further stressed that, to avoid putting AT&T Corp. at a "competitive disadvantage" and to ensure uniformity, its ruling would apply *not* just when AT&T Corp. used IP to route long-distance calls, but also where, as here, "a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN." *Id.* ¶ 19. The bankruptcy court's failure even to acknowledge, much less explain away, this critical language renders its conclusion wholly unpersuasive. For this reason and others, AT&T has appealed the bankruptcy court's ruling to the United States District Court for the Northern District of Texas.[10]

[10] In a letter filing in this docket, Transcom contends that, because it is in bankruptcy, this Commission's resolution of this proceeding would not apply to its services. That is incorrect. Transcom itself notes that AT&T's Petition "request[s] relief so broad as to encompass Transcom's service and the activities addressed by the Bankruptcy Court's order." In addition, as other commenters recognize, "Transcom, in all relevant respects, offers the same type of IP-

### B. IP-Based Providers Such as PointOne Are "Interexchange Carriers" for Purposes of Rule 69.5(b)

PointOne argues that, irrespective of the nature of the service it provides, it cannot be assessed access charges because it is not a "common carrier" and, therefore, is not an "interexchange carrier" under Rule 69.5(b). As AT&T has already explained, a carrier such as PointOne – *i.e.*, a carrier that offers long-haul transmission on interexchange PSTN-to-PSTN voice telephone calls – need not be a common carrier to qualify as an interexchange carrier for purposes of the Commission's access charge regime. In any case, because PointOne *is* a common carrier, the debate is largely academic.[11]

**1.** Rule 69.5 does not require that a carrier be a "common carrier" to qualify as an "interexchange carrier" for purposes of the Commission's access charge regime. Rather, the term "interexchange carrier" refers to both private carriers and common carriers. The Commission confirmed this common-sense conclusion in *HAP Services*, in which it held that "[t]he applicability of interstate carrier charges [under Rule 69.5] does not depend upon whether the entity taking service is a common carrier." *HAP Services* ¶ 15. Instead, the determinative question is whether the carrier transmits "interstate traffic for hire" between exchanges, as PointOne indisputably does. In such circumstances, access charges apply. *See id.*

---

transport services as does [PointOne]." Global Crossing at 2 n.5. Thus, although AT&T is not asserting a claim against Transcom here, there can be no question that the Commission's resolution of these issues on an industry-wide basis would affect Transcom prospectively.

[11] PointOne's assertion that the illustrations at page 10 of AT&T's Petition in effect "acknowledged" that PointOne is not an interexchange carrier is baffling. *See* PointOne at 13-14. These illustrations nowhere suggested that the IP-based "least cost router" was not an interexchange carrier, nor does that conclusion follow from the fact that another entity involved in the transmission of the long-distance call is also an interexchange carrier. By the same token, VarTec's reference to PointOne as an enhanced service provider simply takes at face value PointOne's assertions that it provides at least some enhanced services; contrary to PointOne's claim, it does not "acknowledge" that PointOne is acting as an ESP in providing the services at issue here.

Because it has no answer to the holding of *HAP Services*, PointOne argues that the case is "not good law." PointOne at 15. That is so, the theory goes, because *HAP Services* has not been cited for the proposition on which AT&T relies here. *See id.*[12] But that reflects nothing more than the fact that, in the intervening period, the Commission has not been presented with the far-fetched claim PointOne presses here – *i.e.*, that a carrier can deliberately evade access charges simply by routing calls through a so-called "private carrier" that supposedly does not hold itself out on a nondiscriminatory basis. Contrary to PointOne's apparent understanding, the outlandishness of its claim is no ground for the Commission to ignore established precedent that directly resolves the question at hand.[13]

Nor is it the case that *HAP Services* was overruled *sub silentio* in the various general discussions that PointOne cites in support of its position. In those authorities, the Commission loosely referred to interexchange carriers generally as common carriers without even acknowledging, much less purporting to resolve, the question whether a private carrier can be an "interexchange carrier" for purposes of Rule 69.5(b). For example, in Order, *Request for Review of the Decision of the Universal Service Administrator by Virginia State Department of Education*, 17 FCC Rcd 8677 (WCB 2002) (cited by PointOne at 15), the Wireline Competition Bureau simply included interexchange carriers in a list of categories of service providers that are

[12] PointOne is wrong to claim that *HAP Services* has "not once been cited" at all, PointOne at 15 n.10. *See* Opinion and Order, *In re Cincinnati Bell Telephone Co.*, No. 90-1544-TP-SLF, 1994 WL 120933, at *10-*11 (Ohio P.U.C. Mar. 16, 1994) (quoting and discussing *HAP Services*).

[13] PointOne also characterizes the Commission's holding in *HAP Services* as "dicta." PointOne at 15. But the Commission itself described the case as presenting "the question whether telephone company intrastate and interstate access charges are applicable when HAP's customers obtain certain common carrier services from defendants." *HAP Services* ¶ 7. The Commission then stated unambiguously that, under its rules, the "applicability of interstate carrier charges does not depend upon whether the entity taking service is a common carrier." *Id.* ¶ 15.

presumed to be common carriers eligible for certain discounts in the schools and libraries universal service support mechanism. *See id.* ¶¶ 1-3. In the decision, the bureau found that the entity in question, which leased satellite transponder time, "d[id] not transmit information" and was therefore ineligible. *Id.* ¶ 7. The bureau's decision sheds no light whatsoever on the liability of self-proclaimed private carriers for access charges when they provide long-haul transmission on calls that originate and terminate on the PSTN.[14]

PointOne also cites the regulatory definition of "telecommunications carrier" found in 47 C.F.R. § 51.5, which states that a telecommunications carrier, to the extent it is providing a telecommunications service, shall be treated as a common carrier, and which further states that the definition applies to "interexchange carriers." PointOne at 15. But, by its terms, that definition is expressly limited to "[t]erms used in" Part 51 of the Commission's rules, dealing with interconnection. *See id.* There is no comparable definition in Part 69, entitled "Access Charges." "The usual rule [is] that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (internal quotation marks omitted); *see Russello v. United States*, 464 U.S. 16, 23 (1983). That rule applies equally to the interpretation of agency regulations, *see, e.g.*, *Cramer v. Commissioner, Internal Revenue Serv.*, 64 F.3d 1406, 1412 (9th Cir. 1995), and its application here serves only to confirm that "interexchange carriers" for purposes of Rule 69.5(b) are *not* confined to common carriers.

[14] The same is true of Order, *Request for Review of the Decision of the Universal Service Administrator by Joplin R8 School District*, 15 FCC Rcd 3677, ¶ 6 (CCB 1999) (cited by PointOne at 15). There, the Common Carrier Bureau addressed whether a non-common carrier could be eligible for discounts under the schools and libraries universal service support mechanism, which has nothing to do with this case. Indeed, the entity in that case had actually been certified as "an interexchange telecommunications provider," yet the Common Carrier Bureau nonetheless thought it might *not* be a common carrier – further undermining PointOne's claim that only common carriers can be interexchange carriers. *Id.* ¶ 4.

**2.** In all events, PointOne *is* a common carrier. As demonstrated in AT&T's Petition, PointOne's own materials demonstrate that it provides its "any-to-any" transmission services to all comers on a non-discriminatory basis and at standardized rates. PointOne explicitly states that it "transmits and routes traffic between *any* origination and termination device (including phones, computers, PDAs, wireless devices, etc.) *without discriminating* based on the form or capability of the device."[15] Furthermore, PointOne offers this service at a standardized, industry-wide "per minute rate" for transmission services "effective across the entire PointOne customer base."[16]

PointOne provides no answer to any of this. Indeed, it does not even acknowledge, much less address, its own statement that it provides uniform rates across its "entire customer base," and that it dictates changes to those rates on a uniform basis. Particularly in view of the reliance AT&T placed on this evidence in its Petition, PointOne's silence is glaring. If PointOne had any answer to this point, it would have included it in its comments. The fact that it did not should be dispositive here.

Instead of addressing the evidence on which AT&T's Petition relies, PointOne relies upon a high-level, summary declaration that simply asserts, without elaboration, that PointOne negotiates with customers on an individualized basis. *See* PointOne at 18-19; Flanary Decl. (PointOne Exh. B). But Commission and court precedent teach that a carrier's status as a private or common carrier turns not on such self-serving, conclusory assertions, but rather on an inquiry into the nature of the carrier's service offerings in a given case. *See, e.g.*, Order on Remand,

---

[15] *See* AT&T Petition at 25-26 (quoting Letter from Staci L. Pies, Vice President, Government and Regulatory Affairs, PointOne, to William A. Haas, Associate General Counsel, McLeod USA, at 4 (Feb. 1, 2005) (Exh. B to AT&T Petition)).

[16] PointOne Notification of Rate Adjustment to Metered VPN Services and Variable Rate Private Line (VRPL) (Aug. 16, 2005) ("PointOne Rate Notice") (Exh. C to AT&T Petition).

*Federal-State Joint Board on Universal Service*, 16 FCC Rcd 571, ¶¶ 6-15 (2000), *aff'd*, *United States Telecom Ass'n v. FCC*, 295 F.3d 1326 (D.C. Cir. 2002); *NARUC II*, 533 F.2d at 608-609. That inquiry cannot be satisfied in the abstract fashion PointOne proposes.

Indeed, PointOne has provided no information that would permit the Commission to undertake the inquiry called for here, and that evidentiary failure is fatal to its claim. It is established law that, where a party has relevant evidence uniquely within its control – which PointOne plainly does – that party's failure to produce that evidence "gives rise to an inference that the evidence is unfavorable to" its position. *International Union, United Auto. Workers v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972). The reason for that rule is clear: a party that has relevant evidence in its possession and fails to produce it must be assumed to have something to fear from it, "'and this fear is some evidence that the [evidence], if brought, would have exposed facts unfavorable to the party.'" *Vodusek v. Bayliner Marine Corp*., 71 F.3d 148, 156 (4th Cir. 1995) (quoting 2 *Wigmore on Evidence* § 285, at 192 (Chadbourn rev. 1979)).[17] In these circumstances, the Commission has no choice but to conclude that the details regarding the terms and conditions under which PointOne offers service would confirm what the evidence in the record already shows: that PointOne offers transmission service to all comers on terms that apply "across the entire PointOne customer base" and thus qualifies as a common carrier.[18]

---

[17] *See also Warshawsky & Co. v. NLRB*, 182 F.3d 948, 955 (D.C. Cir. 1999) (approving the NLRB's "adverse inference against the union for failing to produce evidence about the content of conversations involving union members"); *Streber v. Commissioner of Internal Revenue*, 138 F.3d 216, 221 (5th Cir. 1998) (court may draw negative inference from party's failure to produce witness "'whose testimony would elucidate the transaction'") (quoting *Graves v. United States*, 150 U.S. 118, 121 (1893)); *Labadie Coal Co. v. Black*, 672 F.2d 92, 94-95 (D.C. Cir. 1982) ("[T]he failure to produce the ordinary corporate records would have justified drawing the normal inferences against Black as one who should have been able to produce those documents.").

[18] *See* PointOne Rate Notice; AT&T Petition at 25-29.

### C. The Constructive Ordering Doctrine Applies Here and Confirms that PointOne is Liable for Access Charges

As a last-ditch effort to avoid access charges, PointOne argues that liability here would subvert the constructive ordering doctrine. This argument gets things exactly backward. As AT&T explained in its Petition, *see* AT&T Petition at 32-33, and again in its comments on the VarTec Petition, under the constructive ordering doctrine, a carrier is subject to access charges, irrespective of whether it has "ordered" service in the manner dictated by the tariff, if the carrier (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in fact receive such services. PointOne is interconnected with other carriers in such a manner to ensure that the calls that it transmits in IP format will be terminated to the PSTN. In addition, far from taking "reasonable steps" to prevent the receipt of access services, PointOne has affirmatively contracted for that result, and the calls it transmits are in fact terminated to the PSTN. The constructive ordering doctrine accordingly applies here, thus confirming that PointOne is liable for the charges that apply to the access services it has received.

PointOne's efforts to avoid this doctrine cannot be credited. PointOne first claims that it has no expectation of receiving access services from terminating LECs. *See* PointOne at 26-27. But the *entire point* of PointOne's service is to transmit calls and terminate them (directly or indirectly) to end users served by the PSTN. The suggestion that PointOne does not "expect" this result is absurd on its face. Nor does it matter, as PointOne claims, whether it receives the access services directly; on the contrary, the Commission held in the *AT&T Order* that access charges applied to AT&T Corp., even where AT&T Corp. delivered calls through intermediary local exchange carriers. *See AT&T Order* ¶ 11 n.49. It therefore cannot be the case, as PointOne

contends, that a carrier cannot be liable for access charges except where it interconnects directly with the terminating local exchange carrier.

Second, PointOne claims that it has "taken steps to isolate itself" from the receipt of access services by providing its services to wholesale customers. PointOne at 27. But deliberately contracting to transmit calls that go from the PSTN to the PSTN – and that accordingly by definition require access services at either end of the call – cannot plausibly be said to qualify as taking steps to *avoid* receipt of access charge services. And, in any case, in the *AT&T Order*, the Commission rejected carriers' efforts to avoid charges by inserting additional providers into the chain of transmission. *See AT&T Order* ¶ 19.

Finally, PointOne argues that the third criterion is not satisfied because it "does not receive" access services. PointOne at 28. But it is undisputed that the calls at issue here *do* terminate on local exchange facilities, so the third prong of the test is satisfied, even if PointOne does not hand calls directly to PSTN-based end user customers.

As AT&T has already explained, any other result would also violate the filed tariff doctrine. *See* AT&T Petition at 22-24. If PointOne is correct that an interexchange carrier could evade access charges by routing calls through intermediary carriers, it would flout "the policy of nondiscriminatory rates" that is at the core of that doctrine. *Central Office Tel.*, 524 U.S. at 223. As the Supreme Court has explained, that policy "is violated when similarly situated customers pay different rates for the same services." *Id.* The Commission emphasized this very concern in the *AT&T Order*, explaining that the application of access charges to IP-in-the-middle calls handled by multiple carriers was necessary to ensure that AT&T was not "place[d] . . . at a competitive disadvantage" and to "remedy the current situation in which some carriers may be paying access charges for these services while others are not." *AT&T Order* ¶ 19. In so holding,

the Commission necessarily rejected the suggestion, now advanced by PointOne, that interexchange carriers can evade the access charges paid by all other interexchange carriers simply by terminating calls indirectly.[19]

## II. ALL IXCS INVOLVED IN TRANSPORTING PSTN-TO-PSTN INTEREXCHANGE CALLS CAN BE JOINTLY AND SEVERALLY LIABLE FOR ACCESS CHARGES ON THOSE CALLS

In its comments in response to VarTec's Petition, AT&T demonstrated that, where multiple carriers collaborate to terminate an IP-in-the-middle interexchange call without payment of access charges, all interexchange carriers involved in the chain – not just the IP-based providers such as PointOne – are liable, provided they knew or should have known of the access charge evasion. *See* AT&T Comments at 14-15. This result follows from three independent sources of precedent.

*First*, the *AT&T Order* explicitly states that access charges apply to such calls regardless of "whether only one interexchange carrier" is involved in the transmission of the call or "instead multiple service providers are involved," and it explains that, "when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges." *AT&T Order* ¶ 19.

[19] PointOne asserts (at 30 n.22) that it should be exempt from intrastate access charges, purportedly because *PointOne* does not know where end users that use its service are located. But the calls at issue here are *PSTN-to-PSTN* calls, which means they are as a general matter made from fixed locations that are discernible based on the calling and called party numbers. PointOne should not be permitted to avoid intrastate access by failing to monitor call data that can be used to determine the appropriate terminating access rate. Moreover, PointOne has contractually committed to at least one CLEC "to periodically perform such traffic studies as are necessary to confirm" that "all traffic routed to [the CLEC] . . . will be traffic to which neither interstate nor intrastate access charges apply." Master Services Agreement Between McLeodUSA and PointOne, Addendum No. 1, at 2 (Nov. 5, 2003) (Exh. I to AT&T Petition). PointOne does not explain why similar traffic studies could not be used to determine whether interstate or intrastate access charges *do* apply.

*Second*, as noted above, under the "constructive ordering" doctrine, a carrier is deemed to have constructively ordered service when it "(1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in fact receive such services." *Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 685 (E.D. Va. 2000); *see also* Memorandum Opinion and Order, *United Artists Payphone Corp. v. New York Telephone Co.*, 8 FCC Rcd 5563, ¶¶ 1-2 (1993). Under this doctrine, any interexchange carriers involved in the transmission of a PSTN-to-PSTN interexchange call – no less than the IP-based transmission providers such as PointOne – are liable for access charges, provided the carriers knew or should have known that access services would be avoided, and regardless of whether the carrier actually "ordered" those services under the terms of ILEC tariffs.

*Third*, and again as noted above, the filed-rate doctrine also requires that access charges be assessed on the calls at issue. That doctrine creates a "duty to file rates with the Commission," and a concomitant obligation "to charge only those rates," and thereby to "prevent[] price discrimination." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990). Any result that would exempt interexchange carriers from paying access charges for the calls at issue would violate the filed-rate doctrine because it would permit those carriers to receive tariffed services without payment of the charges established in the tariff.

A number of commenters take issue with various aspects of this showing. Their claims are uniformly without merit.

### A. Access Charge Liability Is Not Limited Solely to Terminating IXCs

Several IXCs that have contracted with IP-in-the-middle providers (or with intermediate IXCs that in turn contract with such providers) claim that only the last interexchange carrier that

handles the call before it is terminated with a LEC – so-called "terminating IXCs" – should be liable for access charges, and that originating and intermediate IXCs should be exempt. *See* Global Crossing at 6-18; Level 3 at 12-13; WilTel at 5-7; Broadwing at 2. These carriers argue that AT&T's tariffs apply only to AT&T's "customers," and that "the originating IXC, whether it be VarTec or Global Crossing or any other IXC upstream from the terminating IXC, is not a customer for [AT&T]'s terminating access services." Global Crossing at 8. AT&T's access tariffs, these carriers explain, define a "customer" as an entity "which subscribes to the services offered under this tariff," and "[o]riginating IXCs . . . do not 'subscribe' to [AT&T's] terminating access services" or have any "contractual relationship with [AT&T] with respect to the traffic that [they] originate[] and hand[] off to other IXCs." *Id.* at 9. In order to be deemed a subscriber, "the subscribing 'customer' must have placed an order for the service," which these originating IXCs claim they did not do. *Id.* at 10. These claims fail for multiple reasons.

*First*, as AT&T has already explained – and as explained again above in response to PointOne – under the "constructive ordering" doctrine, it is not necessary to place an order for a tariffed service in order to be deemed a customer of that service. Under that established doctrine – which has been applied in the specific case of interexchange carriers seeking to avoid the rates in switched access tariffs – a regulator or court will "look[] beyond the definition of 'ordering' found in the carrier's tariff," and will hold that a carrier constructively orders services "when the receiver of services (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in fact receive such services." *Advamtel*, 118 F. Supp. at 685.[20] Each of these three conditions is

[20] *See also* Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221, ¶ 188 (1999) ("affirmative consent was unnecessary to create a carrier-customer relationship when a carrier is interconnected with other carriers in such

met with respect to the originating IXCs at issue here. These originating IXCs contracted with third parties to terminate calls to the PSTN and therefore "interconnected in such a manner that [they could] expect to receive access services." They not only "fail[ed] to take reasonable steps to prevent the receipt of access services," but entered into contracts precisely with the expectation of receiving such service. And there is no question that these carriers did in fact receive access services, as AT&T and other LECs terminated the long-distance calls that these carriers originated.

None of the originating IXCs addresses the constructive ordering doctrine in their comments, which is fatal to their claims. Moreover, in support of their view that a carrier must affirmatively order service in order to be deemed a customer, the only case these carriers cite is the very decision that established the constructive ordering doctrine – *United Artists Payphone* – and which establishes the contrary position. *See* Global Crossing at 10 & n.15 (relying on *United Artists Payphone*).[21] In that case, United Artists ("UA") had installed payphones "in such a way as to allow callers to charge [long-distance] calls to UA payphone lines." *United Artists*

---

a manner that it can expect to receive access services, and when it fails to take reasonable steps to prevent the receipt of access services and does in fact receive such services"); Memorandum Opinion and Order, *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647, ¶ 14 (1999) (holding AT&T liable for paying access charges to MGC even though AT&T had notified MGC that "it had neither ordered, nor consented to" MGC's access services, where AT&T continued to provide service to customers that were also served by MGC rather than notify those customers that they must switch either their local carrier or their long-distance company); *AT&T Corp. v. City of New York*, 83 F.3d 549, 555-56 (2d Cir. 1996) (holding that where prison system might not have taken enough "reasonable steps" to keep inmates from using long-distance services, material fact existed as to whether prison system "constructively ordered" long-distance service).

[21] Global Crossing claims that "[t]he Commission has rejected tariffs that seek to hold third parties liable for services that they neither ordered nor wanted." Global Crossing at 11 n.17 (citing Order on Reconsideration, *Halprin, Temple, Goodman & Sugrue v. MCI Telecomms. Corp.*, 14 FCC Rcd 21092 (1999); Order, *US West, Tariff F.C.C. Nos. 3 and 5*, 10 FCC Rcd 13708 (CCB 1995)). But AT&T does not seek to hold Global Crossing liable for services it did not "order[]" or "want[]." Rather, AT&T seeks to hold Global Crossing and other interexchange carriers liable for services that they *did* want but were unwilling to pay for at the tariffed rate.

*Payphone* ¶ 13. The Commission found that, even though UA did not want customers to use its payphones for that purpose, if it had "failed to take steps to control unauthorized" calls, it could in theory be held liable to AT&T Corp. for those calls because "UA could reasonably be held to have constructively 'ordered' service from AT&T [Corp.], thus establishing an inadvertent carrier-customer relationship." *Id.* And, as demonstrated above and in our opening comments, in subsequent decisions the Commission and the courts have further solidified this doctrine.

*Second*, for the same reason the constructive ordering doctrine applies here, there is no merit to Global Crossing's argument (at 11-13) that the filed-rate doctrine bars the imposition of access charges on originating IXCs. To the contrary, the filed-rate doctrine requires the imposition of such charges. Indeed, the purpose of the constructive ordering doctrine is to enforce the filed-rate doctrine – that is, to "ensur[e] equal payment of the tariff rate when one receives services pursuant to a filed tariff," even where the tariffed service was not "ordered" pursuant to the terms of the tariff. *Advamtel*, 118 F. Supp. 2d at 686. Thus, in *Advamtel*, a long-distance carrier (AT&T Corp.) argued that it was not obligated to pay access charges to various CLECs "because it never ordered any services pursuant to the terms specified in the tariff." *Id.* at 684. AT&T Corp. claimed that, because it had not subscribed to the services, it "ha[d] no obligation to pay for the services." *Id.* at 685. The court rejected this claim, explaining that "only if the constructive ordering doctrine is applied here can massive rate discrimination be avoided . . . . [I]f the doctrine is not applied, AT&T [Corp.] will have received millions of dollars of services for free – surely, a result antithetical to the filed-rate doctrine." *Id.* at 687. The same approach is required here.

*Third*, the originating IXCs' argument that they did not subscribe to AT&T's tariff also is directly contrary to the holding of the *AT&T Order*. As noted above, the Commission there held

that AT&T Corp. was liable for access charges even though it did not interconnect directly with the ILECs to which it delivered traffic, but instead routed that traffic through intermediary carriers. *See AT&T Order* ¶ 11 n.49. Like the originating IXCs here, AT&T Corp. did not take any affirmative steps to place an order for terminating access service or even interconnect directly to deliver the traffic at issue, but instead entered into contractual arrangements with third parties specifically designed to allow the delivery of traffic *without* placing access orders and paying the lawfully tariffed access charges.[22] The only difference between the circumstance at issue there and the originating IXCs here is that AT&T Corp. performed the IP-in-the-middle conversion itself, while the carriers here apparently rely on third parties to perform that conversion. But, as we have discussed, the Commission specifically anticipated this distinction in the *AT&T Order* and held that its ruling applies "regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport." *AT&T Order* ¶ 19. The Commission further stated that this clarification was important to "remedy the current situation in which some carriers may be paying access charges for these services while others are not." *Id.*

Global Crossing nonetheless claims (at 15) that this aspect of the *AT&T Order* did not "create a new regime of individual, joint and several liability for all IXCs in the call path," but "dealt only with the question of whether the mere use of IP in the middle of the call path – whether by one or more IXCs – precludes a local exchange carrier from collecting a terminating

[22] Global Crossing claims (at 14-15) that the *AT&T Order* cannot be read to alter the language of filed access tariffs or the Commission's access charge rule (47 C.F.R. § 69.5(b)), and that even if the Commission had wished that result it would not have been able to do so upon a petition for declaratory ruling. But the premise of Global Crossing's claim – that the Commission needed to alter the language of filed tariffs or the Commission's rules in order to impose liability – is false. As described above, under the constructive ordering doctrine, AT&T Corp. was properly deemed a customer of filed access tariffs despite the fact that it did not affirmatively order access services.

access charge for terminating the call." But the only rational interpretation of the *AT&T Order* is that access charge liability for IP-in-the-middle calls extends to all IXCs in the call path. Provided they know or should know of the access charge evasion, Global Crossing and other originating IXCs are no different than AT&T Corp. was insofar as being a "customer" or "subscriber" to the relevant tariffs. Like AT&T Corp., Global Crossing and other originating IXCs purposely avoided purchasing services out of ILEC access tariffs, under the pretext that the traffic at issue was not subject to those tariffs. Also like AT&T Corp., Global Crossing does not terminate the traffic in question directly to the ILEC, but instead routes it through intermediaries. In the *AT&T Order*, the FCC held that such traffic *is* subject to access charges, and that termination services must accordingly be purchased from access tariffs. Global Crossing's claim that it should nonetheless be exempt from access charges precisely because it chose not to purchase from those tariffs in the first place is entirely circular and would render the Commission's holding meaningless.

For the same reason, Global Crossing's claim (at 14) that "nothing in the *AT&T Order* expressly or implicitly varies" the applicable tariffs is beside the point. Global Crossing is liable under the *AT&T Order* precisely because it, and the other interexchange carriers with which it contracted, failed to purchase from AT&T's access tariffs. The purpose of the order is to force these carriers to subscribe to, and thereby become a customer of, ILEC access tariffs, even where they might prefer other alternatives. The Commission's holding does not, therefore, in any way depend on modifying the language of existing tariffs – it merely imposes the terms of those tariffs on carriers that purposely tried to avoid them.

Finally, a number of commenters point out that it is standard industry practice to impose terminating access charges on terminating IXCs, and not on originating or intermediate IXCs.

*See* Global Crossing at 16-19; WilTel at 6-7. As AT&T explained in its Petition, this is correct. But the fact that it is standard industry practice for terminating IXCs to pay access charges in the ordinary course of business does not immunize other IXCs in the chain under the circumstances here, where these carriers knew or had reason to know that the terminating IXC was evading access charges. Put another way, whatever the industry practice is with respect to the payment of access charges in the ordinary course of business where IXCs contract with each other under the assumption that the terminating IXC will pay access charges, that practice does not govern in situations where, as here, it is or should be known that the terminating IXC plans to evade those charges.[23]

### B. Imposing Joint and Several Liability Will Not Enable AT&T To Engage in Double Recovery

PointOne speculates (at 22-23) that, if the Commission were to grant AT&T's Petition and hold multiple IXCs liable for access charges, it would permit AT&T to engage in double billing or double recovery. That is incorrect. AT&T is not seeking double recovery. Rather, the principle here is one of joint and several liability, which the Supreme Court has held applies in the tariff context.[24] That principle makes clear that, where multiple providers misroute an

[23] Wiltel suggests (at 7) that contracts between originating, intermediate, and terminating IXCs can address the respective liability among these carriers and, therefore, the Commission need not intervene. Although Wiltel is correct that parties can contract to address liability – indeed, as AT&T has already shown, PointOne and others have done exactly that – the problem here is that, due to the misrouting of interexchange calls over local interconnection trunks, no access charges are being assessed *at all*. WilTel also argues (at 5) that "ILECs cannot impose access charges on carriers with whom they lack contractual privity." But, as we have discussed, the *AT&T Order* itself held the contrary, assessing access charges on AT&T Corp. for calls terminated indirectly through intermediary carriers, and that result is confirmed by the constructive ordering doctrine.

[24] *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co*., 269 U.S. 217, 231-34 (1925); *see also, e.g.*, *Becker v. Poling Transp. Corp*., 356 F.3d 381, 391 (2d Cir. 2004) ("where the acts of joint tortfeasors cause a single indivisible harm, damages are not apportioned, and each is liable in damages for the entire harm"); Restatement (Second) of Torts § 875 (1979)

interexchange PSTN-to-PSTN call and thereby evade access charges in violation of the Commission's rules, they are each jointly and severally liable for the entire harm that results.[25] The Commission need not worry about double billing or double recovery, because that issue can be addressed in the court actions where recovery for unpaid access charges is sought. Indeed, given that the Commission does not believe it has the authority to "act as a collection agent for carriers with respect to unpaid tariffed charges" and instead expects those actions to be brought in state or federal courts, *AT&T Order* ¶ 23 n.93, the Commission should also allow those courts to address the issue of liability among the various carriers involved in handling calls, including any potential concerns about double recovery.

PointOne also claims (at 23) that, in connection with VarTec's bankruptcy proceeding, AT&T already has obtained full recovery from VarTec in an access-charge settlement, but is nonetheless seeking recovery from PointOne "for providing the same access services." PointOne has its facts wrong. Although AT&T has entered into a settlement with VarTec, *see* AT&T Comments at 5 n.6, that settlement provides no consideration for the access charges that VarTec evaded by routing calls through PointOne. Furthermore, contrary to PointOne's apparent understanding, AT&T's action against PointOne is directed at *all* the access charges PointOne has evaded on PSTN-to-PSTN interexchange calls, not just the millions of dollars in charges PointOne has evaded on traffic received from VarTec. In any case, to the extent PointOne

---

("Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.").

[25] While PointOne claims (at 23) that this could result in requiring "different parties to pay different amounts in access charges" in violation of the anti-discrimination provisions of section 202 of the Communications Act, it gets things exactly backwards. It would be a violation of those rules if some PSTN-to-PSTN interexchange calls were subject to access charges while other similar calls were exempt simply because there were multiple parties involved in handling those calls. By contrast, a rule of joint and several liability would merely ensure that access charges could properly be collected and that liability for those charges could be fairly apportioned among the parties who received the benefits of terminating access service.

believes it is entitled to an offset based on AT&T's settlement with VarTec, that is an issue that will be addressed by the court, after the Commission's resolution of the primary jurisdiction referral. On no theory could PointOne's claim in this respect be a basis for the Commission to delay resolution of the critically important issues in this docket.[26]

### C. The Commission's Resolution of These Issues Must Apply Retrospectively

As demonstrated above, the Commission should hold that all IXCs involved in transporting PSTN-to-PSTN interexchange calls are jointly and severally liable for the lawful access charges on those calls, where they knew or should have known of the evasion. Contrary to some commenters' opportunistic claim, that determination should not – indeed, cannot – apply only prospectively.

Indeed, this issue has already been resolved by the *AT&T Order*. The Commission issued that order "to provide clarity to the industry with respect to the application of access charges" to IP-in-the-middle traffic, in light of "significant evidence that similarly situated carriers may be interpreting our rules differently." *AT&T Order* ¶ 2. Furthermore, as we have stressed throughout, the Commission – with direct citation to a pleading that asked, *inter alia*, how traffic carried by providers such as PointOne and Transcom should be treated – stated that access charges would apply to IP-in-the-middle traffic "regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP

[26] Similarly, there is no merit to PointOne's speculative concern (at 23-24) that AT&T may have received reciprocal compensation charges that should be offset against the unpaid access charges it is seeking. In many cases, when interexchange calls are terminated to AT&T ILECs through an intermediary CLEC via local interconnection trunks, AT&T's billing systems do not bill reciprocal compensation on those calls. For example, where the CPN indicates that the call is an interLATA interexchange call rather than a local call, the billing systems in many cases bill neither reciprocal compensation nor access for the call (*i.e.*, the call simply "falls out"). In all events, as with the claim addressed in the text, to the extent PointOne believes a portion of its traffic is entitled to an offset based on reciprocal compensation, that is a fact-specific claim that PointOne is entitled to raise in court.

transport." *Id.* ¶ 19. In view of this unequivocal holding, no carrier can plausibly claim that, in the wake of the *AT&T Order*, it was not on notice that access charges apply to IP-in-the-middle traffic, or that it reasonably relied to its detriment on any other agency pronouncements. *See AT&T Order* ¶ 22.

### D. The Commission Should Promptly Resolve AT&T's and VarTec's Petitions in this Proceeding

In a transparent effort to continue avoiding access charges for as long as possible, PointOne – alone among the commenters – argues (at 29-30) that the Commission should decline to rule on AT&T's and VarTec's petitions and instead address the questions raised by those petitions in the IP-Enabled Services and Intercarrier Compensation Reform proceedings. But as most other commenters – including the originating IXCs – agree, the Commission should resolve the applicability of access charges on IP-in-the-middle traffic "as soon as possible" in *this* proceeding. WilTel at 2; *see also* Level 3 at 15 ("It is appropriate for the Commission to take this opportunity to clarify the rules regarding compensation for some types of IXC traffic."); Global Crossing at 4 (advocating Commission action on both AT&T's and VarTec's petitions); Qwest at 12-14. Indeed, any contrary approach would undermine the purpose of the *AT&T Order* to provide "regulatory certainty" "[i]n the interim" while the Commission "undertak[es] a comprehensive examination of issues raised by the growth of services that use IP, including carrier compensation and universal service issues." *AT&T Order* ¶ 15.[27]

[27] PointOne claims (at 29) that the "imposition of access charges on IP-enabled providers would require detailed regulation to ensure that entities throughout the network provide the information necessary to allow entities like PointOne to distinguish traffic subject to access charges from other IP traffic on their networks." But there is no basis to believe regulation is required to achieve this result, which PointOne could instead accomplish by insisting on such information in the contracts with its customers. As WilTel notes (at 6), it is "up to the Call Termination Provider to design its own network and make its own arrangements" with other carriers. For the same reason, the Commission should have no sympathy for PointOne's

The issues at stake in this proceeding, moreover, go well beyond large ILECs such as AT&T. Cinergy Communications Company, a small facilities-based *CLEC*, explains that, where carriers such as PointOne route traffic without payment of access charges, it affects *all* local exchange carriers that rely on their own facilities. Cinergy itself, for example, "relies upon access charges as a major source of revenue to support its facilities-based network," and the evasion of those charges by carriers such as PointOne frustrates its effort to "rely on its own network and . . . continue to pay for expansion of that network." Cinergy at 2.

Although the Commission should act promptly in this proceeding, AT&T also believes the Commission should reform the intercarrier compensation regime as soon as possible. The multiple requests for declaratory rulings regarding IP-based traffic that the Commission has received over the past few years, starting with the AT&T Corp. petition that lead to the *AT&T Order*, highlight the struggles the industry has faced and will likely continue to face in trying to apply decades-old regulatory regimes to new IP-based technology. The Commission should therefore act promptly to enforce the *AT&T Order* by granting AT&T's instant Petition, and should then use the broader rulemaking proceeding to establish a new, more rational intercarrier compensation regime that will apply on a going-forward basis.

---

complaint (at 24) that granting AT&T's Petition would require PointOne to adopt systems that enable it "to track which traffic is PSTN-to-PSTN for the purpose of enabling [AT&T] to collect access charges." If PointOne does not want to develop those systems, it should not be carrying PSTN-to-PSTN traffic. Indeed, PointOne's failure to develop these systems in the more than 18 months since the *AT&T Order* evinces its intent to maintain a business model that has no regard for the Commission's access charge rules. In any event, as noted above, *see supra* n.19, PointOne has already contractually committed to perform traffic studies as necessary to determine whether interstate *or* intrastate access charges apply to the traffic it carries.

## III. THE COMMISSION SHOULD CLARIFY THE OBLIGATIONS OF CLECS INVOLVED IN ACCESS CHARGE EVASION

As the Commission recognized in the *AT&T Order*, although the access charge rules apply expressly to interexchange carriers, "any intermediate LECs that may hand off the traffic to the terminating LECs" also could be held liable depending on "the terms of any relevant contracts or tariffs." *AT&T Order* ¶ 23 n.92. The Commission's general pronouncement about potential liability is undoubtedly correct, as far as it goes.

Three CLECs (NuVox, XO, and Xspedius) calling themselves the "Joint CLEC Commenters" state that the Commission should take the same approach as in the *AT&T Order*, but nonetheless devote several pages to hypothesizing about ways that the relief sought in AT&T's Petition could subject CLECs to a greater risk of liability. While these CLECs mischaracterize AT&T's Petition, the simple solution is for the Commission to reaffirm the conclusion it adopted in the *AT&T Order*. As these CLECs correctly state (at 8), other issues regarding the liability of CLECs are "not before the Commission in this docket."[28]

Although it is not necessary to the disposition of AT&T's Petition to address the role of CLECs in access charge avoidance schemes, it would nonetheless promote industry stability for the Commission to clarify what steps CLECs should take to help prevent such schemes. In particular, the Commission should make clear that if CLECs expect to avoid liability for access charge evasion they cannot simply put their heads in the sand with respect to the traffic they

[28] The issue involving CLEC liability for access charges is quite different from the meet point billing arrangements that Level 3 (at 7-8) and Pac-West (at 4-6) describe. In meet-point-billing arrangements AT&T and an unaffiliated LEC or CLEC jointly provide access over dedicated trunk groups pursuant to specific meet-point-billing provisions in contracts or tariffs. Here, by contrast, AT&T is the sole access provider and a CLEC is merely being used as an intermediary in order to launder interexchange traffic through that CLEC's existing interconnection trunks (and corresponding interconnection agreement) with AT&T. Thus, the meet-point-arrangements between AT&T and other ILECs or CLECs are not relevant to the disposition of the issues in this proceeding.

hand off to terminating ILECs. AT&T addresses these issues in more detail in its comments on Grande's petition for declaratory ruling (WC Docket No. 05-283).[29]

## CONCLUSION

The Commission should declare that wholesale transmission providers such as PointOne are "interexchange carriers" for purposes of Rule 69.5(b) and are thus liable for access charges when they "use local exchange switching facilities for the provision of an interstate or foreign telecommunications service." 47 C.F.R. § 69.5(b). The Commission should also confirm that interexchange carriers can be liable for access charges when they deliver ordinary long-distance calls to IP-based transmission providers which, in turn, terminate those calls (directly or indirectly) without payment of the applicable access charges, provided the originating or intermediary interexchange carrier knows or should know of the access charge avoidance. Finally, the Commission should reject VarTec's claim that the interexchange carrier in this scenario is entitled to compensation as a "transiting" carrier when the calls in question are CMRS-originated, intra-MTA calls.

[29] In addition to the issues addressed in the text, VarTec's Petition seeks a ruling that it is entitled to compensation as a "transiting" carrier when it delivers CMRS-originated, intra-MTA traffic to an IP-based provider, which in turn delivers it (directly or indirectly) to an ILEC for termination. In its comments on VarTec's Petition, AT&T explained that this claim is based on a misunderstanding of the Commission's reciprocal compensation rules and on the way in which transiting is compensated in the ordinary course. Nothing in the filed comments calls into question AT&T's discussion of that issue, and AT&T accordingly does not address the issue further here. AT&T does, however, note that NASUCA's description (at 5) of the ICF plan – as abolishing transiting charges and requiring all carriers to obtain all compensation from their own end users – is inaccurate. Under the ICF plan, transiting is not subject to bill & keep; instead, the ICF plan contemplates that transiting carriers will contract with other carriers for the provision of transiting services.

Respectfully submitted,

/s/ Colin S. Stretch

_____

Michael K. Kellogg
Colin S. Stretch
Evan T. Leo
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

James P. Lamoureux
Jack Zinman
Gary L. Phillips
Paul K. Mancini
AT&T INC.
1401 I Street, N.W.
Washington, D.C. 20005
(202) 326-8800

Martin E. Grambow
Randall Johnson
AT&T INC.
175 E. Houston
San Antonio, Texas 78205
(214) 464-3620

*Counsel for AT&T Inc.*

December 12, 2005